ORDERED.

Dated: May 10, 2021

Catherine Peek McEwen
United States Bankruptcy Judge

UNITED
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Heather Hills Estates, L.L.C.,

Debtor, /

Case No.: 8:16-bk-09521-

CPM Chapter: 11

David Harper, et al.

Plaintiffs,

v.

Heather Hills Amenities, LLC, et al.,

Defendants. /

Adv. Proc No: 8:19-ap-00504-CPM

AMENDED* ORDER GRANTING MOTION TO DISMISS

THIS PROCEEDING is an action originally filed in state court[1] and removed to the bankruptcy court by the Defendants. It came on for hearing on February 24, 2020, on the Motion to Dismiss Complaint for Declaratory Relief (the "Motion to Dismiss") (Doc. No. 7, as supplemented at Doc. No. 33) filed by Heather Hills Amenities, LLC and Lakeshore Management, Inc. (the "Defendants), the Plaintiffs' motion (Doc. No. 13) to strike the Motion to Dismiss, and the Defendant's response (Doc. No. 21) thereto.

*Amended only to correct scrivener's error on line 2 of page 2 where the word "almost" was inadvertently omitted before the phrase "all lots within the subdivision."

[1] Case No. 2019-CA-004484, filed in the Twelfth Judicial Circuit Court in and for Manatee County, Florida.

The Plaintiffs, all owners of lots located within the Heather Hills Estates subdivision, object to the provisions of the Debtor's confirmed chapter 11 plan that make almost all lots within the subdivision subject to certain covenants and deed restrictions (the "New Restrictions"). In so objecting, the complaint requests declaratory relief in the form of a court order that: 1) declares that the New Restrictions do not apply to the Plaintiffs' lots as of October 1, 2018, the effective date of section 712.12 of the Florida Statutes which the Plaintiffs argue precludes application of the New Restrictions to their lots, 2) declares that the New Restrictions would deprive Plaintiffs of rights or property, and 3) awards Plaintiffs the costs associated with this action. The Court declines to grant such relief. Instead, I conclude that this proceeding is subject to dismissal under the doctrines of res judicata and equitable mootness.

Res Judicata

Following confirmation hearings that took place in the Debtor's underlying bankruptcy case, *In re Heather Hills Estates, LLC,* Case No. 8:16-bk-09521-CPM (the "Case") on March 23, 2018, April 5, 2018, and May 24, 2018 (together, the "Confirmation Hearings"), the Court approved the Debtor's chapter 11 plan of reorganization (the "Plan").[2] Court approval of the Plan was memorialized in writing on June 18, 2018, with the entry of an order confirming the Plan (the "Confirmation Order").[3] The Plan provides for, among other things, application of

[2] *See* Debtor's Single Integrated Amended Plan of Reorganization Dated January 18, 2018 (Doc. No. 213 in the Case).

[3] *See* Order Confirming Plan (Doc. No. 258 in the Case). On March 19, 2019, the Court entered an order (Doc. No. 360 in the Case) granting the Debtor's motion to modify the Confirmed Plan. That order did nothing more than: 1) substitute in a different purchaser and 2) more fully reflect the express and implicit findings and conclusions the Court stated on the record at the Confirmation Hearings, which findings and conclusions were already incorporated into the Confirmation Order under Fed. R. Civ. P. 52, adopted by Fed. R. Bankr. P. 9014. Because this second order made no new substantive rulings, the Confirmation Order remains the operative order for purposes of applying res judicata and for determining whether section 712.12, Fla. Stat., enacted October 18, 2018, constitutes "intervening law" as the Plaintiffs contend. (Stay tuned for further discussion on both issues.) *See also In re 8 Mile Ranch, LLC,* No. 6:12-bk-10227, 2015 WL 5307389, *3 (Bankr. M.D. Fla. Sept. 10, 2015 ("A bankruptcy court retains post-confirmation

the New Restrictions[4] to all lots located in Heather Hills Estates except for those particular lots identified in the Plan as "Excluded Lots." The owners of the non-excluded lots are hereinafter referred to as the "Lot Owners." The Plaintiffs, except for Kenna Gunn, are all Lot Owners impacted by the Plan. Ironically, Kenna Gunn is the only Plaintiff who appealed the Court's ruling to approve the Plan even though her lot was not impacted by the Plan.[5] She later withdrew that appeal. No other party sought review of the Confirmation Order, and the time to appeal it expired long ago. Clearly then, the Confirmation Order has become a final, non-appealable order.

Having reviewed the papers filed in this proceeding, as well as the Plan and Confirmation Order, the Court concludes that the Defendants' arguments on the application of res judicata set forth on pages 5 through 8 of their Motion to Dismiss correctly state the rule of decision. The finality of court orders, including confirmation orders, must be respected. The Eleventh Circuit has confirmed that "[t]he general rule in this circuit, and throughout the nation, is that changes in the law after entry of a judgment do not prevent the application of res judicata and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled."[6] Quoting an earlier decision of the Supreme Court, the Eleventh Circuit continued:

> [n]or are the res judicata consequences of a final unappealable judgment altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case . . . [t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the

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jurisdiction to interpret and enforce is own orders, particularly when disputes arise over a bankruptcy plan of reorganization.") (citations omitted).

[4] As defined in the Plan, the term "New Restrictions" means "the Amended and Restated Declarations of Covenants and Restrictions for Heather Hills Estates," a copy of which is attached to the Plan as Exhibit A.

[5] Because her lot is "Excluded" from the Plan, Ms. Gunn has no standing to object to application of the New Restrictions. And because Ms. Gunn is not a licensed attorney, she may not represent the interests of others in a court of law. The Court has explained this to Ms. Gunn on more than one occasion. *See, e.g.,* Order Denying Reconsideration of Order Denying Motion for Judicial Determination (Doc. No. 69) and paragraph 12 of the Confirmation Order.

[6] *Air Parts, Inc. v. AVCO Corp.,* 736 F.2d 1499, 1503 (11th Cir. 1984) (citations omitted).

> conclusive character of judgments, the consequences which it was the very purpose of the doctrine of res judicata to avert.[7]

Consequently, even if the Confirmation Order had been wrongly decided, the doctrine of res judicata nonetheless applies.

Equitable Mootness

Equitable mootness is "a discretionary doctrine that permits courts sitting in bankruptcy appeals to dismiss challenges (typically to confirmed plans) when effective relief would be impossible."[8] Although the current proceeding is not a direct appeal of the Confirmation Order, I find it appropriate to consider the principles underlying this doctrine because the relief sought by the Plaintiffs is impossible to grant without undermining the most critical aspect of the Plan, namely, application of the New Restrictions to the Lot Owners. Such relief would also, simultaneously, decimate the reasonable expectations of the party that purchased the Debtor's assets in accordance with, and in reliance upon, the Plan, long after the time to appeal the Confirmation Order had expired and months before the Plaintiffs filed their complaint. As stated in the Debtor's motion for final decree, filed on June 10, 2019, "[t]he closing under [the Plan] has occurred . . . and the Debtor has essentially been liquidated and no longer conducts business or holds any assets."[9] Stated in the simplest of terms, at this stage the bell cannot be unrung.

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[7] *Id.* (citing *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981). *See also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 268 (2010) (citations omitted) (legal error in order confirming chapter 13 plan did not render order void where opposing party afforded due process); *Finova Capital Corp. v. Larson Pharmacy, Inc. (In re Optical Tech. Inc.)*, 425 F.3d 1294 (11th Cir. 2005) (a mere error in the exercise of jurisdiction is not grounds to determine the order void; the order is binding and res judicata applies absent some "constitutionally defective failure of process.") (citations omitted).

[8] *In re Fisherman's Pier, Inc.,* 460 F. Supp. 3d 1345, 1352 (S. D. Fla. 2020) (citation omitted). *See also, In re Winn-Dixie Stores, Inc.,* 377 B.R. 322, 329 (M.D. Fla. 2007) (strong public policy favors upholding the finality of confirmation orders, as "this policy protect entities that have emerged from the costly reorganization process and the investors who make such reorganizations possible.") (citation omitted).

[9] *See* Debtor's Motion for Final Decree and Certificate of Substantial Consummation (Doc. No 369 in the Case).

Section 712.12, Florida Statutes

To avoid the doctrines of res judicata and equitable mootness, the Plaintiffs cite to section 712.12 of the Florida Statutes, subsection (3) in particular. Subsection (3) states:

> With respect to any parcel that has ceased to be governed by covenants or restrictions as of October 1, 2018, the parcel owner may commence an action . . . for a judicial determination that the convents or restrictions did not govern them as of October 1, 2018, *and* that any revitalization of such covenants and restrictions as to that parcel would unconstitutionally deprive the parcel owner of rights or property.

(Emphasis added.) The Plaintiffs' reliance on this provision fails for two reasons. First, section 712.12 did not become effective until October 1, 2018.[10] Thus, although the Plaintiffs characterize this as *intervening* law, it was not in effect until more than three months *after* entry of the Confirmation Order. In support of their position, the Plaintiffs cite a decision of the Supreme Court of the United States for the proposition that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[11] It is undebatable that section 712.12 was not in effect when the Court entered the Confirmation Order. Therefore, the Court could not apply a provision that was not the law in Florida at that time.

The Plaintiffs correctly note that the Plan, by its terms, has an "effective date" that is after October 1, 2018. However, the Confirmation Order itself became effective immediately upon the Court's oral ruling confirming the Plan on May 24, 2018 (the date of the last confirmation hearing).[12] And the Confirmation Order, by *its* terms, states that "[t]he provisions of the Plan bind the Debtor, any creditor, all Lot Owners, or any party in interest, including any successor in interest

[10] *See* Ch. 2018-55. Fla. Laws.
[11] *Bradley v. School Board of Richmond,* 416 U.S. 696, 711 (1974).
[12] *See IBT Int'l, Inc. v. Northern (In re Int'l Admin. Svcs., Inc.),* 408 F.3d 689, 700 (11th Cir. 2005) (court's order is complete when made, even if not reduced to paper and entered on the docket until a later date).

to any of them, whether or not the claim, interest or demand of [such party] is impaired under the Plan or whether or not [such party] has accepted the Plan or objected to the Plan." Therefore, the Confirmation Order binds the Plaintiffs to the Plan, which, in turn, makes the New Restrictions applicable to all Lot Owners.[13]

Second, assuming arguendo that subsection (3) of section 712.12 applied here, it would not provide grounds for the relief the Plaintiffs seek because application of the New Restrictions would not and did not "unconstitutionally deprive [them] of rights or property." All Lot Owners were kept informed of Debtor's confirmation process throughout that process. They had ample opportunity to review the proposed Plan and, if they chose, to seek independent legal advice about how the Plan might impact their property rights. The Lot Owners were also invited to attend hearings and to otherwise participate in the confirmation process, which many of them, in fact, did. They were each given the opportunity to vote on whether they wanted Heather Hills Estates to be governed by the New Restrictions, with the *majority* of Lot Owners voting in favor of the New Restrictions. Thus, the Plaintiffs were given their "day in court" and afforded due process. In fact, as stated in the Confirmation Order, I found "not only that the contents of the plan are in compliance with state law and proposed in good faith, but that the processes and procedures before this Court provided a higher level of due process than that contemplated in the Florida Statutes § 720.403, et seq."[14] So, even if the Plaintiffs could establish that their lots ceased to be governed by

[13] To the extent the Plaintiffs look to prior orders of this Court in support of their argument that the Plan, and therefore, the New Restrictions, did not become effective until after October 1, 2018, this argument misses the mark. The Plan was binding upon all Lot Owners upon entry of the Confirmation Order, which was prior to that date, notwithstanding that the Plan provided a condition subsequent as to its effective date, as most every confirmed chapter 11 plan does. As to the Court's entry of orders (*see, e.g.,* Doc. No. 324 in the Case) "without prejudice" to seek relief in state court, the Court overlooked that the Confirmation Order expressly reserves this Court's jurisdiction "over the Debtor, all creditors, parties in interest, Lot Owners, and the Plan consistent with the Bankruptcy Code and the specific provisions of the Plan and this [confirmation] order," and that reservation of jurisdiction is itself res judicata.

[14] *See* Order Confirming Plan (Doc. 258 in the Case) at decretal paragraph 5.

covenants and restrictions as of October 1, 2018, I find and conclude that absolutely *no* unconstitutional deprivation of rights or property resulted from the application of the New Restrictions to their lots, and that is really the gravamen of section 712.12.[15]

On the contrary, the majority of Lot Owners voted in favor of the New Restrictions. Therefore, these Lot Owners apparently determined that any potential negative impact on their individual lots as a result of the New Restrictions is outweighed by the positive benefits gained — from both safety and aesthetic standpoints[16] — by having the community's common areas and amenities professionally and routinely maintained for the benefit the community as a whole.

Accordingly, it is

ORDERED that the Motion is granted *nunc pro tunc* to April 15, 2021, the date of the original order (Doc. No. 72), and this proceeding is dismissed.

The Clerk's Office to serve a copy of the order on the movant and any interested non-CM/ECF filers.

[15] "A real property owner who has ceased to be subject to covenants or restrictions as of October 1, 2018, may commence an action by October 1, 2019, *to determine if* revitalization would *unconstitutionally* deprive the parcel owner of right or property." Fla. H.R. Final Summary Analysis of HB 617 (summarizing the purpose of section 712.12) (March 23, 2018) (emphasis added).

[16] Examples of restrictions that may be viewed as beneficial to Heather Hills Estates residents include the provision and maintenance of a recreation area within the community, which area is governed by regulations prohibiting such things as disturbing noise and littering; repair and maintenance of the retention pond; and the limitation (with some exceptions) of occupancy of homes within the community to persons 55 years of age or older. *See* Exhibit A to the Plan.